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Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA,
Petitioner,

v.

RAY HAYS, *et al.*,
Respondents.

On Appeal from the United States District Court for the Western District of Louisiana

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BRIEF OF THE NATIONAL BAR ASSOCIATION, THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL BAR ASSOCIATION, THE NATIONAL BLACK CAUCUS OF STATE LEGISLATORS, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Each of the *amici* is a national organization actively participating on behalf of its constituents.

The National Bar Association ("Association"), founded in 1925, is a professional membership organization which represents more than 21,000 African American attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the protection of minority voting rights as a means of solving America's racial problems.

The League of United Latin American Citizens ("LULAC"), the nation's largest Hispanic organization,

is concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. Founded in 1929, LULAC has approximately 33,000 dues-paying members. LULAC has often appeared as plaintiff or *amicus* in litigation before this Court and in many other federal and state courts to vindicate the rights of minorities, particularly Hispanics, who are denied the full enjoyment of their constitutional rights.

In 1977, ninety African American state legislators founded the National Black Caucus of State Legislators ("NBCSL"). Today NBCSL represents some 540 members in forty-three states, the U.S. Virgin Islands and the District of Columbia. The primary mission of the NBCSL is to develop, conduct and promote educational, research and training programs to enhance the effectiveness of its members as they consider legislation and public policy issues which impact, either directly or indirectly, upon the "general welfare" of African American constituents within their respective jurisdictions.

SUMMARY OF ARGUMENT

This case involves two highly significant and controversial issues—race and the fundamental constitutional right to have meaningful participation in the political process by virtue of the vote.

The District Court Panel erred because this case implicates the Fifteenth Amendment's voting rights clause, not the Fourteenth Amendment's equal protection clause. To the extent the Fourteenth Amendment is applicable, District No. 4 is subject to intermediate scrutiny, not strict scrutiny. In this regard, District No. 4 presents none of the concerns associated with a racial classification or quota; thus heightened scrutiny is not triggered. Moreover, following the case of *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) intermediate scrutiny is the proper test to judge majority-minority voting districts.

Even if strict scrutiny is applied, pursuant to *Shaw v. Reno*, 509 U.S. ——, 113 S. Ct. 2816 (1993), compli-

ance with the permissive provisions of the Voting Rights Act to create a second majority-minority district constitutes a compelling state interest. To hold otherwise would open the door to equal protection challenges in districts where there is a majority of any one race. Moreover, adherence to a traditionally shaped district clearly reflects respect for political subdivisions and satisfies the requirement for compactness as established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and respect for traditional and historical boundaries as settled in *Reynolds v. Sims*, 377 U.S. 533 (1964).

ARGUMENT

I. FIFTEENTH AMENDMENT JURISPRUDENCE IS SUFFICIENT TO DETERMINE THE CONSTITUTIONALITY OF A REDISTRICTING PLAN ADOPTED PURSUANT TO THE VOTING RIGHTS ACT

Introduction

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.[1]

This country has consistently struggled with the concept of justice as it relates to the governance and treatment of its people. While born to be the model democracy, the soul of America has toiled for over two hundred years to ensure its citizenry the fundamental constitutional right to vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). It is telling that the constitution has been amended on four separate occasions in an attempt to secure the right to vote. *See* U.S. Const. amend. XV, XIX, XXIV, and XXVI. In the struggle for the franchise, there can be no dispute that no other race or minority

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[1] *The Federalist* No. 51 at 324 (James Madison) (Clinton Rossiter 1961).

has been subjected to more obstructions—from grandfather clauses to the medievalist intimidation of life and limb—than African Americans. *See e.g.*, Dudley O. McGovney, *The American Suffrage Medley* (1949); Kirk Harold Porter, *A History of Suffrage in the United States* (1918).

Specifically, with respect to Louisiana, this struggle has made its way to the chamber of this Court on numerous occasions. *See Beer v. United States*, 425 U.S. 130 (1976) (New Orleans city council member districts' reapportionment plan reflected African American voting strength); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 n.2 (1966) (literacy test held unconstitutional, Louisiana on record as supporting such tests); *Louisiana v. United States*, 380 U.S. 145 (1965) (interpretation test held unconstitutional; citizenship test ordered postponed; monthly reports ordered on voting registration of African Americans); *Anderson v. Martin*, 375 U.S. 399 (1964) (placing "Negro" on ballot next to candidate's name held unconstitutional).

In fact, Louisiana's history of disenfranchisement of African Americans comprises the worst record this country has seen. *See United States v. State of Louisiana*, 225 F. Supp. 353, 363-97 (E.D. La. 1965); H.R. Rep. No. 439, 89th Cong., 1st Sess. at 12-17 (1965); S. Rep. No. 162, 89th Cong., 1st Sess. at 9-10 (1965). Given Louisiana's long history of disenfranchisement of African Americans, the Voting Rights Act of 1965, as amended ("Voting Rights Act") identified Louisiana, with a small number of other states, as appropriate for remedial action. Thus, the case at hand should be considered in light of the historic struggle for the fundamental right to vote.

A. The Fifteenth Amendment, by its Very Language, Applies to Redistricting Plans Compelled by the Voting Rights Act

The Fifteenth Amendment reads:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the

> United States or any State on account of race, color, or previous conditions of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment, as recognized by this Court, has always been self-executing. *South Carolina*, 383 U.S. at 325; *see Guinn v. United States*, 238 U.S. 347 (1915). Indeed, this Court has firmly established that when Congress enacts a law to enforce the Fifteenth Amendment it "may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina*, 383 U.S. at 324. This Court has also recognized that Congress' authority to carry out the mandates of the Fifteenth Amendment is not limited to forbidding violations of the Fifteenth Amendment, but is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *South Carolina*, 383 U.S. at 327 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Marshall, J.)). In this regard, the Voting Rights Act was enacted in 1965 to effectuate the purpose of the Fifteenth Amendment. S. Rep. No. 162, 89th Cong., 1st Sess. at 2 (1965).

The case before this Court arises from federal and state action taken in compliance with the Voting Rights Act, which was enacted by Congress as an expression of its remedial powers under the Fifteenth Amendment. Specifically, the U.S. Attorney General and the State of Louisiana worked together to intentionally create a second majority-minority Congressional district ("District No. 4") that would further allow African Americans residing in Louisiana to have a more meaningful vote at the Congressional level. *See Reynolds*, 377 U.S. at 554-55. The Respondents' claim that District No. 4's bizarre shape intentionally and disproportionately segregates voters by race. Mot. to Affirm at 1. This issue perforce invokes the Fifteenth Amendment, since it is the only constitutional provision specifically enacted to control those

instances where race and franchise are both at issue. *Louisiana*, 380 U.S. at 156.

Consequently, the constitutional question is whether District No. 4 abridges or denies any citizen's right to vote based upon race, color, or previous conditions of servitude. Existing case precedent compels a finding that District No. 4 is permissible under the Fifteenth Amendment.

In cases where voters raised a racial segregation claim, this Court has indeed applied the Fifteenth Amendment. For instance, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court ruled that a twenty-eight sided electoral district, which eliminated all but four of four hundred African American voters was unconstitutional under the Fifteenth Amendment.[2] In the present case, Respondents argue that District No. 4 is bizarrely shaped. Mot. to Affirm at 1. Unlike the electoral district in *Gomillion*, however, District No. 4 was not designed to exclude a race of voters thereby providing no other expression of their franchise. The redistricting plan in *Gomillion* resulted in the total exclusion of African Americans from the democratic process. In the case at hand, the composition of District No. 4 is 45% white and 55% African American. Thus, contrary to the facts in *Gomillion*, no particular race in District No. 4 has had its right to vote abridged or eliminated.

In *City of Richmond v. United States*, 422 U.S. 353, 371 (1975), this Court again applied the Fifteenth Amendment. Specifically, Fifteenth Amendment jurisprudence was applied to the city of Richmond's annexation plan, which reduced the percentage of African Americans eligible to vote in city elections. This Court reversed the

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[2] In *Wright v. Rockefeller*, 376 U.S. 52 (1964), this Court again examined an allegation that voting rights were abridged based upon the segregation of the races. In that proceeding, bizarrely shaped Congressional districts separated races, yet the Court held that on the issue of race, the Petitioners had failed to meet their burden of proof. Thus, this Court in *Wright* did not decide whether the Fourteenth or Fifteenth Amendment controlled.

lower court and found that African Americans' right to vote was neither denied nor abridged under § 5 of the Voting Rights Act,[3] inasmuch as African Americans' political strength was not undervalued or underrepresented. By stark contrast, District No. 4 is comprised of approximately 45% white voters and 55% African American voters. Indeed, District No. 4's configuration is similar in effect to the *City of Richmond* annexation, inasmuch as it reduced the African American population from 52% to 42%. The issue in *City of Richmond*, as it should be in this case, was whether any person's right to vote had been abridged or denied. In the case at bar the answer, based upon the holding in the *City of Richmond*, is no. Clearly the political strength of the affected group, white voters in District No. 4, is not undervalued or underrepresented, particularly when five out of seven of Louisiana's Congressional districts enjoy a white majority population.

The conclusion that white Louisianans are neither undervalued nor underrepresented is further supported by this Court's ruling in *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 n.24 (1977) ("UJO"). In *UJO* this Court held that the rights of white voters residing in the majority-minority districts were not abridged because:

> [T]he white voter who as a result of the 1974 plan is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county. Of course, if voting does not follow racial lines, the white voter has little reason to complain that the percentage of nonwhites in his district has been increased. (citation omitted)

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[3] Voting Rights Act § 5 tracks the Fifteenth Amendment. *Beer*, 425 U.S. at 147, n. 4.

In sum, this Court recognized in *UJO*, that unlike the racial explosion of the franchise in *Gomillion*, the New York redistricting plan did not totally exclude the other racial group from participation in the political process.

It is clear that the Three-Member Panel in the Western District of Louisiana, from which this appeal originates, has misinterpreted *Shaw*; to that end, total consideration of the Fourteenth Amendment was employed to the exclusion of the Fifteenth Amendment. *See Hays v. State of Louisiana*, 862 F. Supp. 119 (W. D. La. 1994). The District Court Panel misinterpreted Justice O'Connor's suggestion that *Gomillion* and *Wright* may be more appropriately considered in the context of the Fourteenth Amendment's equal protection clause. *Shaw v. Reno*, 509 U.S. ——, 113 S. Ct. 2816, 2829-26 (1993). It would have been more instructive for the court below to have closely scrutinized the lineage of cases Justice O'Connor employs in her dictum to interpret *Gomillion* and *Wright*.[4] The failure of the court below to carefully scrutinize *Shaw* has resulted in the Three-Member Panel totally ignoring Fifteenth Amendment jurisprudence, which, if allowed to stand, would render the Fourteenth Amendment supreme over the Fifteenth Amendment. This result is inapposite to fundamental constitutional jurisprudence and interpretation.

Interestingly, Justice Harlan spoke to the fallacy of inflating the Fourteenth Amendment when he said:

> Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection

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[4] Neither *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *Personnel Administrators of Mass. et al. v. Feeney*, 442 U.S. 256 (1979), nor *Whitcomb v. Chavis*, 403 U.S. 124 (1971) involved claims of race segregation, rather *Mobile* and *Whitcomb* involved dilution of voting rights, which O'Connor suggested *Shaw* was not such a case. *Shaw*, 1135 S. Ct. at 2829-30. Even more inapposite, *Feeney* involved a claim of gender discrimination.

> Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures.

Reynolds, 377 U.S. at 590-91. (Harlan, J., dissenting) Justice Harlan recognized that the Fourteenth and Fifteenth Amendments to the Constitution were added for specific purposes. This Court in *Gomillion* and *City of Richmond* also respected the distinct missions of these amendments. Thus, consideration of majority-minority districts within the context of the equal protection clause works to nullify not only the remedial nature of the Voting Rights Act but also the import of the Fifteenth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Fifteenth Amendment jurisprudence is not only sufficiently developed to ferret out actual racial segregation, such as in *Gomillion*, but also to comprehend whether: (i) an affected group's right to vote has been denied or abridged; or (ii) the affected group's political strength has been undervalued or underrepresented. *City of Richmond v. United States*, 422 U.S. 353 (1975); *see also City of Mobile v. Bolden*, 466 U.S. 55 (1980); *City of Rome v. United States*, 446 U.S. 156 (1980). Thus, there is no need to intertwine the Fourteenth Amendment with voting rights cases involving race, because Fifteenth Amendment jurisprudence has developed sufficient constitutional principles to handle issues involving race and voting.

Simply put, the test to establish a Fifteenth Amendment violation is whether a racial group has been totally excluded from the political process. In *UJO*, this Court concluded that the white voters in a majority-minority district had not been excluded from the political process because they had effective representation in other districts. In *Gomillion*, this Court understood that the elimination of all but four African American voters from an electoral district constituted total exclusion from the political process. Conversely, in *City of Richmond*, this Court realized that an annexation plan which reduced the population of African Americans from 52% to 42% did not result in

their exclusion from the political process. In the case at bar, whites have 45% of the voting population in District No. 4. Accordingly, in light of the above case law, there can be no argument advanced that whites in District No. 4 have been excluded from meaningful participation in the political process.

The District Court Panel has committed judicial error by failing to consider the Fifteenth Amendment. No case, including *Shaw,* holds that the Fifteenth Amendment is no longer applicable in voting rights cases. To overlook this fatal flaw in the *Hays* District Court's decision will essentially vitiate the Fifteenth Amendment as well as the remedial aspects of the Voting Rights Act.

II. NOTWITHSTANDING THE FIFTEENTH AMENDMENT'S APPLICATION, FOURTEENTH AMENDMENT EQUAL PROTECTION JURISPRUDENCE WOULD COMPEL INTERMEDIATE SCRUTINY BE APPLIED TO DISTRICT NO. 4

A. The Three-Judge Panel Misinterpreted *Shaw*'s Discussion of Irregular Shape

The Three-Judge Panel erroneously concluded that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." *Hays,* 862 F. Supp. at 124. Employing strict scrutiny, the Three-Judge Panel found District No. 4 constituted a racial classification and therefore declared its formation violative of the Fourteenth Amendment's equal protection clause. *Id.* at 125. This ruling misapplies *Shaw* and is at odds with settled equal protection jurisprudence.

The Three-Judge Panel misinterprets *Shaw* as holding that strict scrutiny is to be applied to any irregularly shaped electoral district. To the contrary, Fourteenth Amendment jurisprudence requires the application of intermediate scrutiny to District No. 4.

Specifically, the Three-Judge Panel failed to comprehend that a *Shaw* claim is narrowly limited to specific circumstances, particularly when *Shaw* is considered in the context of *Wright.* In *Wright,* maps and oral evidence

were introduced to prove that the newly created district constituted racial gerrymandering.[5] This Court, however, ruled that this evidence was insufficient to establish a racial gerrymandering cause of action. *Id.* at 55. Thus, strict scrutiny was not applied. This is consistent with Justice O'Connor's interpretation of *Wright* which suggests that when a race of people lives in one community, a reapportionment plan which concentrates this race in one district may be legitimate. *Shaw*, 113 S. Ct. at 2826. Moreover, Justice O'Connor further concluded that *Wrights's* irregularly shaped district, which separated races to a significant extent, did not necessarily violate the equal protection clause based upon the compactness of the districts and maintenance of the integrity of political subdivision. *Id.*

Petitioners argue that District No. 4 follows the lines of the "old eighth" district thereby satisfying the history and traditional elements established in *Reynolds*. *Reynolds*, 377 U.S. at 578 (maintenance of political subdivisions recognized as legitimate state action). In addition, Petitioner asserts that the District No. 4 comports with the state's districting practices. Sol. Gen. J.S. at 19 (Sept. 26, 1994). Respondents contend that District No. 4 fails the compactness requirement because it is 250 miles long. Mot. to Affirm at 17. But other districts in the current state plan are also long. Opp'n to Mot. to Affirm at 6-7 (Nov. 18, 1994). Moreover, "[i]t is similar to previous districts drawn by the state in the geographic area." *Id.* It is also comparable in its length to other districts drawn by the state in this very plan. *Id.* The *Hays* Court failed to consider these factors in the context of their finding that District No. 4 is bizarre. Thus, the Three-Judge Panel committed judicial error by failing to consider applicable law.

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[5] This ruling was also made in spite of "statistics [showing] that the Eighteenth District contained 86.3% Negroes and Puerto Ricans; the Nineteenth, 28.5%; the Twentieth, 27.5%; and the Seventeenth, 5.1%." *Id.* at 54.

The Three-Judge Panel also failed to carefully consider *Shaw* in light of the import of *UJO*. *UJO* held that the purposeful use of race in the creation of a majority-minority electoral district did not violate the equal protection clause. Justice White, writing for this Court in *UJO*, 430 U.S. at 161 concluded:

> Implicit in Beer and City of Richmond, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to the extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments. We are unwilling to overturn our prior cases, however. Section 5, and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color, are constitutional. *Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting of apportionment.* (footnote omitted) (emphasis added).

Indeed, Justice O'Connor acknowledged that race consciousness is not always race discrimination. *Shaw*, 113 S. Ct. at 2826. She distinguishes *UJO*'s sanctioning of a majority-minority race conscious district, however, as a case involving vote dilution. *Id.* at 532. Thus, Justice O'Connor concludes that *UJO* did not overrule the racial classification cases of *Wright* and *Gomillion*. In *Wright* and *Gomillion* the shape of the districts were highly bizarre. In *Wright*, Justice Harlan described the reapportionment plan as having zigzagging and tortuous boundaries. *Wright*, 376 U.S. at 58. Whereas in *Gomillion* the

district was twenty-eight sided. *Gomillion*, 364 U.S. at 341.

Justice O'Connor properly identifies *Gomillion* as a case in which redistricting was accomplished for the purpose of segregating African Americans from an electoral district. In *Gomillion*, a redistricting plan resulted in a twenty-eight sided electoral district which excluded all but four of four hundred African Americans.[6] By identifying the purposeful use of race in irregularly shaped districts to segregate voters by race, Justice O'Connor elevated the new equal protection claim to that of a *Bakke*-type quota. Richard H. Pildes and Richard G. Niemi, *Expressive Harm, 'Bizarre Districts' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483, 504-16 (1993).

The significance of the ruling in *Gomillion*, and its inherent limitations, was completely misunderstood by the Three-Judge Panel below. A failure to have a truly compact district which can be identified and isolated to one small area is not a signal that the redistricting plan, in and of itself, should fail. Both of these concepts are relative in their terminology and usage.[7] As the record shows, the Justice Department argues that Congressional District No.

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[6] "Segregation" and "apartheid" should never be used lightly nor outside their specific context. To use these words out of context is to belittle the struggle for human rights, including voting rights in Louisiana, which gave rise to the terminology. As Nobel Leaureate, Elie Wiesel, persuasively attests, the term holocaust (in which six million Jews were systematically murdered) cannot be directly compared to any other human experience.

[7] As Richard H. Pildes and Richard G. Niemi in *Expressive Harms, 'Bizarre Districts' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. at 541 (1993) state:

> . . . the language of 'appearance' obscures the fact that districts might be oddly shaped along several different dimensions. In the absence of a clear conceptual understanding of what dimensions of district appearance are relevant, the basis for judging districts will be unclear. Different observers will find different aspects of the districts to be troubling.

4's shape is not dispositive of either racial intent or compactness. Instead of analyzing District No. 4 in light of cases such as *Gomillion* and *Wright*, the majority in *Hays* filled its decision with loosely worded rhetoric. Thus, the Three-Judge Panel was in error. Accordingly, the *Hay*'s Panel inappropriately applied strict scrutiny to District No. 4, which is inconsistent with *UJO*.[8]

Instructive to the case at bar is Justice Stevens' dissent in *Shaw*, which stated that the equal protection clause does not impose any requirement that a Congressional district must be compact. *Shaw*, 113 S. Ct. at 2843-44. Nor does the equal protection clause, suggests Justice Stevens, prevent a state from purposely drawing a Congressional district to benefit a group belonging to a minority race.[9] *Id.* Significantly, he explains that:

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[8] More recently, in *Metro Broadcasting*, this Court also applied intermediate scrutiny to Congressionally mandated remedial acts which employed race-based classifications. Specifically, this Court in *Metro Broadcasting* used intermediate scrutiny to uphold a Congressionally mandated affirmative action law which promoted racial diversity in the communications field. *Metro Broadcasting v. FCC*, 497 U.S. 547, 564-65 (1990).

[9] If the equal protection doctrine is applied in this case, the doctrine should be found to require upholding District No. 4 as the second majority-minority Congressional district in Louisiana. In 1976, the Court upheld a reapportionment plan for New Orleans which made African Americans the voting majority in one district and the population majority in another. *Beer*, 425 U.S. at 142. The Court concluded that given the evidence of racial voting blocs, it was probable that one or two African Americans would be elected to the city council. *Id.* Thus, in a city where the populace elected five councilmembers by district and two in at large elections, and the African American population was 35%, the possibility that two African Americans could be elected to the city council showed that the reapportionment plan met the mandates of the Voting Rights Act. *Id.* In 1995, justice similarly requires that Louisiana's second majority-minority Congressional district, District No. 4, be found constitutional. Where there are seven Congressional districts in Louisiana, (a state which has denied African Americans the right to vote for most of the state's history), African Americans (who constitute 28% of the voting age population) should be provided with a meaningful opportunity to select the candidate of their choice

> The duty to govern impartially . . . is not violated when the majority acts to facilitate the election of a member or a group that lacks such power because it remains underrepresented in the state legislature—whether that group is defined by political affiliation, by common economic interests, or by religious, ethnic, or racial characteristics.

Id. at 2844.

Critical to Justice Stevens' analysis of invidious intent is the idea that the majority acts to its own detriment to benefit the minority. The gravamen of Stevens' argument recognizes the strength of the majority in comparison to the minority and that the minority relies upon the majority for fair treatment. This imbalance of power clearly controls whether an equal protection violation can be brought to bear in those instances. The beneficent action of the majority is dispositive of a benign purpose—which is inapposite to the purpose underlying the invidious discrimination demonstrated in *Hirabayashi v. United States*, 320 U.S. 81 (1943). Under Justice Stevens' approach, District No. 4 would be upheld since it is the State of Louisiana acting for the benefit of its African American constituents.

In light of *UJO* and *Gomillion*, District No. 4 does not constitute a racial classification sufficient to require strict scrutiny. There are none of the characteristics of exacting political expulsion, as was present in *Gomillion*. Conversely, similar to the districts in *UJO*, District No. 4 was created to provide minority voters with a meaningful opportunity for participation in the political process. The *Hays* Panel failed to properly consider this case law when rushing to the conclusion that District No. 4 con-

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in two of the seven districts. "Legislators represent people, not trees or acres . . . . [T]he right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds*, 377 U.S. at 562. African Americans in Louisiana need District No. 4 to secure their voting rights. More importantly, this Congressional district will lessen racial polarization and racial stigmas, creating a strong, equitable democracy.

stituted a racial classification. Thus, the lower court inappropriately applied strict scrutiny.

B. District No. 4 is not an Antecedent to Stereotyping, Stigmas, and Racial Polarization

In contrast to Justice Stevens, Justice O'Connor is concerned that overt state action, whether or not it benefits minorities, leads to stereotyping, stigmas and racial polarization. Justice O'Connor in *Shaw*, 113 S. Ct. at 2824-25, states that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite hostility." *Id.* at 2825. Justice O'Connor also extends these premises to maintain that a reapportionment plan can be "so irrational on its face that it immediately offends principles of racial equality." *Id.* at 2829. Justice O'Connor cites *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), for the proposition that the use of race in remedial measures produces negative consequences.

Neither *Bakke*, *Wygant*, nor *Croson* are instructive with respect to the impact a majority-minority Congressional district will have upon race relations or upon the favored race's self-esteem. More importantly, none of these cases involve voting rights. Justice Souter, dissenting in *Shaw*, recognized that in contrast to the context of *Croson* (competitive bidding contracts) and *Wygant* (teacher layoffs), a state's drawing of electoral districts almost always "require[s] some consideration of race for legitimate reasons where there is a racially mixed population." *Shaw*, 113 S. Ct. at 1845.

Indeed, in the context of voting rights, this Court in *UJO* spoke directly to the issue of stereotypes, stigmas, and race relations. Justice White announced the decision of the Court. Importantly, Justices Stevens and Rehnquist, joined with Justice White's ruling that:

> There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful

> manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.

UJO, 430 U.S. at 165. Empirical studies support *UJO*, and further palliate the validity of using *Bakke*, *Wygant*, and *Croson* in the context of voting rights.

Importantly, consider a general maxim concerning prejudice as set forth by a group of psychologists from San Diego University:

> [D]iscriminatory behaviors are more likely to be seen as evidence of prejudice when directed toward members of less powerful groups than when directed toward members of more powerful groups.

Miriam J. Rodin, Judy M. Price, Jeff B. Bryson, and Francisco J. Sanchez, *Asymmetry in Prejudice Attribution*, 26 J. Exper. Soc. Psy. 481, 482 (Mar. 3, 1989). The authors of *Asymmetry in Prejudice Attribution* go on to conclude that "the asymmetry effect in prejudice attribution occurs because discriminatory behaviors produce an inference of greater ill-will when enacted by members of more empowered groups, and a perception that these behaviors cause greater harm to members of the less empowered groups." *Id.* at 503. District No. 4's creation is not the result of racial majority taking advantage of a political or racial minority. Consequently, the circumstances by which stigmas and stereotypes are advanced are not present.

C. District No. 4 is Beneficial Because it Includes Traditionally Excluded Minorities into the Political Process

Louisiana Congressional District No. 4 is beneficial inasmuch as it includes minorities more directly in the democratic/political system while not excluding from

or diluting the strength of any race.[10] Inclusion of racial diversity and balance in Louisiana Congressional District No. 4 is in stark contrast to the cases in which whites excluded minorities from the political process. *See e.g., Guinn v. United States,* 238 U.S. 347 (1915) (invalidation of grandfather clauses); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (boundaries drawn to exclude all but four of four hundred African American voters). Clearly, there is a significant difference between cases in which whites exclude minorities, and this case in which the majority (the U.S. Congress, U.S. Attorney General and State of Louisiana) is including African Americans more directly and meaningfully in the democratic process.

Inclusion of minorities into the American fabric is at the heart of *Brown v. Board of Education,* and the line of anti-segregation cases that followed. Inclusion of African Americans in the democratic process will lessen stereotypes and racial polarization; it will grant an opportunity for an important and unique voice to be heard and understood, as well as important issues to be addressed and understood.[11] District No. 4 presents none of the racial

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[10] There is no racial quota involved here inasmuch as there is no guarantee that District No. 4 will necessarily correlate to the election of a minority to Congress. Given the nationwide malaise toward voting, there is no guarantee that on election day minorities will turn out in sufficient numbers to vote as a majority. Ronald Smothers, *The South; Blacks Feel Like Wallflowers As No Candidates Woo Them,* The New York Times, A1 (Feb. 29, 1992). Furthermore, because of the significant difference in the cycles of political alienation between whites and African Americans, there is a very good chance in District No. 4, (which is 55% African Americans and 45% white), that whites may constitute the majority of voters. Cedric Herring, James S. House, and Richard P. Mero, *Racially Based Changes in Political Alienation in America,* 72(1) Soc. Sci. Q. 128 (March 1991).

[11] Although it is clear that whites have difficulties accepting changes which benefit minorities, it is equally as clear that this initial discomfort should be replaced with a better understanding of minority issues and concerns, as well as understanding why measures such as majority-minority districts are necessary. Cardell

stereotyping, stigmas or polarization concerns which would require heightened scrutiny. Accordingly, legal precedent demonstrates and empirical studies suggest that in the context of voting rights, *Bakke, Wygant,* and *Croson* provide no support for rejection of District No. 4.

Nothing surrounding the creation of District No. 4 would compel an equal protection strict scrutiny analysis. The use of race was not motivated by the racial stereotypes or stigmas that were condemned in *Gomillion* and *Brown v. Board of Educ. (Brown I),* 347 U.S. 483 (1954), or led this Court to reach the decision it had centuries ago in the *Dred Scott* or *Plessy v. Ferguson* decisions. *Dred Scott v. Sanford,* 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson,* 163 U.S. 537 (1896). Consequently, when the facts surrounding the creation of District No. 4 are considered within the context of *UJO, Wright* and the *City of Richmond,* only an intermediate level of scrutiny is required.

III. EVEN IF STRICT SCRUTINY IS APPLIED TO THE REDISTRICTING PLAN, COMPLIANCE WITH THE FEDERALLY MANDATED VOTING RIGHTS ACT, WHICH WAS ENACTED PURSUANT TO § 2 OF THE FIFTEENTH AMENDMENT, CONSTITUTES A SUFFICIENT COMPELLING STATE INTEREST

Assuming *arguendo* that strict scrutiny applies to this case, a compelling interest must be established in order to uphold District No. 4. Respondents argue that no compelling interest exists for the creation of District No. 4, yet, Respondents concede that compliance with a mandatory provision of the Act constitutes a compelling in-

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K. Jacobson, *The Bakke Decision,* 27(4) J. Confl. Resol. 687, 690-91 (Dec. 1983); T. Alexander Aleinikoff, *A Case for Race-Conciousness,* 91 Colum. L. Rev. 1060, 1091-1093 (1991) (quoting Randell Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate,* 99 Harv. L. Rev. 1327, 1331 (1986)); Jon Hurwitz and Mark Peffley, *Traditional Verse Social Values As Antecedents of Racial Stereotyping and Policy Conservatism,* 14(4) Polit. Beh. 395 (1992).

terest. Mot. to Affirm 22. More specifically, Respondents remain resolute in their assertion that compliance with various provisions of the Voting Rights Act, where not required, fails to constitute a sufficient compelling interest. *Id.*

Implicit in Respondents' argument, however, is the notion that there is no compelling state interest in the state's proactive compliance with a permissive provision of the Voting Rights Act. That is, if no further violation exists, then proactive compliance with the Voting Rights Act by the state no longer constitutes a compelling interest. While some support for this inference may exist in *Shaw* [12] the case cannot be read to stand for the proposition that compliance with a federally mandated statute, enacted pursuant to § 2 of the Voting Rights Act cannot constitute a compelling state interest.[13] Such a restrictive reading constitutes a misreading of *Shaw* and effectuates a significant change to the Voting Rights Act. Indeed, such a reading of *Shaw* would place this Court in the role of both the federal and state legislatures.[14]

As stated *ante*, the *Shaw* majority introduced the strict scrutiny test for redistricting plans that are "so bizzare on [their] face that [they are] 'unexplainable on grounds other than race.' " *Shaw*, 113 S. Ct. at 2825. This Court

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[12] *Shaw*, 113 S. Ct. at 2830. ("But in the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what is required.")

[13] The Court has clearly recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555.

[14] This Court has recognized that "State legislatures are, historically, the fountainhead of representative government in this country." *Reynolds*, 377 U.S. at 564. Moreover, in *Voinovich v. Quilter*, 507 U.S. ——, 113 S. Ct. 1149, 1156 (1993), Justice O'Connor recognized that "it is the domain of the States, not the federal courts, to conduct apportionment in the first place." *See also South Carolina*, 383 U.S. at 327 (under the Fifteenth Amendment Congress may act to the extent of its powers).

recognized in *Shaw* that compliance with the prescriptions of the various provisions under the Voting Rights Act would constitute a sufficient compelling interest.[15] Citing *Beer v. United States*, 425 U.S. 130 (1976) as support, Justice O'Connor acknowledged that compliance with the "nonretrogression principle" contained within § 5 exemplified a possible compelling interest. Stated in the positive, in *UJO* Justice White noted that "where reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority" the nonretrogression test was satisfied. *UJO*,430 U.S. at 159. And, citing this Court's decisions in *Wright* and *Reynolds*, Justice O'Connor further recognized that maintaining "the integrity of various political subdivisions" and providing for "compact districts" are sufficient compelling interests. *Shaw*, 113 S. Ct. at 2830. Nothing in *Shaw*, *Reynolds* or *Wright* suggests that this is the only violation possible under § 5 of the Voting Rights Act.

Relying upon recent decisions in the area of equal protection jurisprudence, Justice O'Connor further recognizes that "eradicating the effects of past racial discrimination" may constitute another compelling interest. *Shaw*, 113 S. Ct. at 2831. Indeed, Justice White explicitly acknowledged the remedial nature of the Voting Rights Act in *UJO*.[16]

Shaw clearly states that compliance with a federal statute constitutes a compelling interest. There is nothing in *Shaw* that indicates a proactive compliance stance or retroactive compliance stance (upon finding a violation) con-

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[15] "The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied." *Shaw*, 113 S. Ct. at 2830.

[16] Citing *South Carolina*, 383 U.S. 301 (1966), this Court stated:

> It is apparent from the face of the Act, from its legislative history, and from our cases that the Act itself was broadly remedial in the sense that it was 'designed by Congress to banish the blight of racial discrimination in voting . . . .'

UJO, 430 U.S. at 156.

trols the characterization of the compelling interest. Consequently, creation of a second majority-minority district indeed can constitute a compelling interest. While Justice O'Connor cites to *Croson* and *Wygant* as instructive of the evidentiary requirements to support a compelling state interest, her reference to the cases can in no way be read so as to extinguish the concept that the permissive provisions in the Voting Rights Act, which permit states to proactively seek pre-clearance from the Attorney General or a Three-Judge Panel, are insufficient in and of themselves, to establish a compelling state interest.[17] Such a reading of *Shaw* would constitute an abrogation of various provisions in the Voting Rights Act.

In addition, in *Voinovich v. Quilter*, this Court recognized that states need not wait for a violation before complying with the Voting Rights Act. *Voinovich*, 113 S. Ct. at 1156-57. Any reading of the Voting Rights Act which denies states the ability to prospectively comply with the Voting Rights Act constitutes an abrogation of the permissive provisions contained within the Act absent the clear guidance of the Congress.[18] If this Court holds that such action fails the compelling interest prong, this Court will in effect undermine further efforts on the part of states to come into compliance with the Voting Rights Act on a prospective basis.

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[17] Section 5 of the Voting Rights Act establishes a state may may seek pre-clearance in order to determine that a "qualification, prerequisite, standard practice, or procedure will not have the effect of denying or abridging the right to vote on account of race or color . . . ." 42 U.S.C. § 1973c.

[18] Established jurisprudence clearly sets forth the power and authority of Congress in this particular realm. In *South Carolina v. Katzenbach*, this Court recognized the extent and reach of Congressional authority to fashion remedial legislation pursuant to the Fifteenth Amendment. Specifically, this Court rejected the petitioner's argument that Congress was limited to crafting general legislation prohibiting violations of the Fifteenth Amendment and that *courts* were empowered and obliged to create specific remedies to such violations. *South Carolina*, 383 U.S. at 327.

Justice Douglas, in *Hirabayashi*, recognized that a proactive stance towards creating a remedy is a compelling interest, particularly "where the peril is great." [19] Viewed in its proper perspective, and in light of the long history attendant to this state in obstructing sufferage rights for various segments of its citizenry, such an approach on the part of the state legislature makes good sense. Such an action, effectuating an effective and viable redistricting plan, should constitute a compelling interest—whether done for the first time *or* for the second time.[20] In *Beer*, this Court recognized that states are not required to wait for a violation to occur before taking action to address the issue of redistricting.[21]

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[19] In his concurring opinion in *Hirabayashi*, Justice Douglas recognized that a governmental entity need not wait for the harm to occur. *Hirabayashi*, 320 U.S. at 107 (". . . nor should the military be required to wait until espionage or sabotage becomes effective before it moves. . . . Certainly we cannot say . . . [the military] should have procrastinated.") It is interesting to note, that *Hirabayashi* is one of the few equal protection cases in which this Court found that the government acted pursuant to a compelling interest even though the compelling interest involved internment of Japanese-Americans during World War II *solely* upon the basis of their ancestry. This action was taken after the bombing of Pearl Harbor by the Japanese.

[20] Indeed, Louisiana has a historical context which predisposes it to complying with the Voting Rights Act in a proactive manner.

> "To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination."

South Carolina, 383 U.S. at 327.

[21] By "prohibiting the enforcement of a voting procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer*, 425 U.S. at 140 (citing H.R. Rep. No. 91-397, p. 8). Moreover, the Court went on to state that "Section 5 was intended to insure that [the gains thus far achieved in minortory political participation] shall not be destroyed through new

Ultimately, Respondents' argument relies heavily upon the racial composition of District No. 4. and the equal protection clause to provide a basis for challenging such a district. This approach suffers from three severe flaws. The first problem with this approach is the implicit subsumption of the Fifteenth Amendment into the Fourteenth Amendment, such that the race component of the Fifteenth Amendment no longer has any meaning as compared to the equal treatment component of the Fourteenth Amendment.

The second problem with such an approach is that it sets precedent for an equal protection challenge based upon the racial composition and complexion of a district. Accordingly, any district which involves such a racial composition is open to equal protection challenges by white and black inhabitants of the district. Thus, the minority constituents of a newly created majority white district could bring an equal protection challenge, arguing that the racial composition of the district violates their right to participate in a "color-blind electoral process." *Shaw*, 113 S. Ct. at 2827. This would in turn create a judicial and political quagmire with no clear solution in sight. It is only when Respondents' line of argument is carried to its logical conclusion that the flaws within the argument become manifest.

Third, Respondents' argument sounds like an attempt to cap the state's right to effectuate a remedy of this nature. Respondents' argument attempts to provide a sufficient basis for establishing a quota as to the number of majority-minority districts a state may create. This Court has stated repeatedly that it will not entertain implementation of racial quotas.[22] To that end, use of the equal pro-

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[discriminatory] procedures and techniques." *Id.* (citing S. Rep. No. 94-295, p. 9).

[22] *See e.g., Bakke*, 438 U.S. at 289. ("The special admissions program is undeniably a classification based on race and ethnic background. . . . Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.")

tection doctrine to challenge compliance with the Voting Rights Act necessarily pits one constitutional amendment against the other in terms of the primary of the amendments. Such an action can only bring about the complete conflagration of jurisprudence in either sphere. Thus, the Court should reject Respondents' argument that permissive compliance with the Voting Rights Act fails to continue a compelling interest.

To further buttress Respondents' argument that no compelling interest exists in creation of a second district, Respondents inquire into whether a vote dilution violation exists under § 2 of the Voting Rights Act. Such a violation would provide a justification for creation of District No. 4. Mot. to Affirm 27. Advancing the first prong required under *Gingles v. Thornburg* to establish a dilution claim, Respondents argue that Petitioner failed to demonstrate that the minority group is sufficiency "geographically compact to constitute a majority in a single-member district.[23] *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). Respondents advanced this argument based upon the district's contours which follow the length of the Red River. While Petitioner presented evidence that the district followed the shape of the previous district and other districts in the plan, the Three-Judge Panel was not persuaded by the evidence presented. The Panel found that the state failed to provide sufficient evidence as to the issue of compactness. Opp'n to Mot. to Affirm at 5-6.

While the shape and contours of the district have taken on primary significance *vis-a-vis Thornburg v. Gingles*, 478 U.S. at 49, the *Hays* Panel failed to take into consideration the underlying rationale driving the *Gingles* test. The

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(citations omitted). *See also, Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[23] Petitioners failed to raise the issue of whether District No. 4 satisfies the second and third prong of the *Gingles* test thus, this issue will not be addressed here. Opp'n to Affirm 6.

underlying rationale, determining the extent of integration of the community and its political strength, implies a reasonable standard which should be taken into consideration when making a determination of compactness. Moreover, *Gingles,* when considered in the context of earlier case law, does not impose an absolute standard of compactness.

The *Gingles* test was born out of this Court's attempt to give life to the Congressional intent of the subject provision of the Voting Rights Act. *Gingles,* 478 U.S. at 47 n.15. The gravamen of the compactness requirement was to keep *integrated* districts from being sifted and winnowed to form a new district to the detriment of the minority group within the population. *Id.* at 50. Thus, the compactness requirement had a dual role—to demonstrate vote dilution, and to indicate the degree of integration and political strength of the affected group present in the particular community. *See Growe,* 113 S. Ct. 1149 (1993) (applying *Gingles* test to single-member district claims of vote dilution).

Respondents assert that District No. 4 fails the compactness requirement simply because it is 250 miles long. Mot. to Affirm at 17. This argument goes solely to the geometric shape of the district and fails to consider the underlying rationale driving the decision in *Gingles* as stated above. If the size of the district were dispositive of compactness, reapportionment plans in agrarian and rural areas would fail simply based upon the square miles involved. Such a mechanical reading of the compactness requirement would sound a death knell for large districts. Nothing in *Gingles* can be read to impose a strict or absolute standard of compactness. In fact, in light of other dilution cases, *Reynolds*, and its progeny, *Lodge*, and *Wright*; the opposite reading bears more truth. Geographic compactness is a relative concept. That is, it is relative to the setting to which it is applied. Geographic compactness, as a concept, must have some elasticity. In light of the variety of settings to which this concept will be applied, this maxim holds particular weight. In an

urban setting, strict geographical compactness sounds reasonable given the stricter confines of most municipalities. In a rural setting, the boundaries are far more relaxed than the urban setting, thereby requiring a somewhat relaxed standard of compactness. This is the lesson that can be gleaned from the dilution cases, and in particular *Reynolds*, and its progeny, *Lodge*, *Wright*, and *Growe*. These cases set forth the standards articulated in *Gingles*. As such, the requirement for compactness should be tempered against a reasonable standard that considers factors such as the nature of the area to be restricted and the historical context of settlement patterns in that state.[24]

This reading of *Gingles* is not without some support. In an earlier case, *Rogers v. Lodge*, 458 U.S. 613, 614 (1982) this Court upheld a lower court decision to split a "large predominantly rural county" where the plaintiffs established a vote dilution claim. The judicially created districts were established in order to remedy vote dilution which was exacerbated by the at-large election system. This case is instructive in that it dealt with an area "approximately two-thirds the size of the State of Rhode Island." *Id.*

In light of the Three-Judge Panel's misreading of *Shaw* and *Gingles* regarding the establishment of a compelling interest, this case should be remanded to the Panel for further evidentiary findings.

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[24] Voting rights jurisprudence following enactment of the Voting Rights Act clearly took into consideration the fact that ". . . legislatures prefer to follow traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition." *Kirkpatrick v. Preisler*, 394 U.S. 526, 552 (1969) (Harlan, J., dissenting). However, this requirement as initiated in *Reynolds*, followed in *Kirkpatrick*, and its progeny, should not and cannot be blindly considered absent some temperance or constraints of reasonableness upon the principle.

CONCLUSION

For the reasons stated, this court should reverse the Western District of Louisiana's decision and uphold the creation of District No. 4.

Respectfully submitted,

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